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Reports

MARTIN v. UMI KELSOM

[O. C. J. (Thomson C.J.) May 29, 1962]

[K.L. — Divorce Suit No. 15 of 1961]

Divorce — Christian man marrying Muslim woman under Christian Marriage Enactment, (Cap. 109) — Whether invalid — Jurisdiction of Court in matrimonial causes — Divorce Ordinance, 1952, ss.3, 14, 15(f).

Conflict of laws — Putative husband possessing capacity by personal law to marry putative wife — Putative wife lacking capacity to marry putative husband by personal law — Whether marriage valid.

The petitioner and the respondent went through a form of marriage before a Registrar of Marriages for Selangor in accordance with the provisions of the Christian Marriage Enactment on February 25, 1950. At the time of solemnisation the petitioner was a Christian domiciled in England while the respondent was a Muslim and domiciled in Selangor.

The petitioner petitioned that the marriage be declared void *ab initio* on the ground that at the date of its solemnisation he was a Christian and the respondent was a Muslim and therefore by reason of her personal law was incapable of inter-marrying with him:

Held: in the exercise of its jurisdiction under the Divorce Ordinance the Court must determine the validity of the marriage according to the law of the husband's domicile, which was English law. So determined, the marriage was valid. *Sottomayer* v. *De Barros*, (2) *Ogden* v. *Ogden* (3) and *Chetti* v. *Chetti* (4) followed.

Cases referred to:—

(1) *Re Loh Toh Met* [1961] M.L.J. 234, 244 *et seq.*
(2) *Sottomayer* v. *De Barros*, 2 P.D. 81; 3 P.D. 1; 5 P.D. 94.
(3) *Ogden* v. *Ogden* [1908] P. 46.
(4) *Chetti* v. *Chetti* [1909] P. 67.
(5) *Public Prosecutor* v. *White* [1940] M.L.J. 214.
(6) *Gasper* v. *Gonsalves* (1874), 13 Bengal L.R. 109.

DIVORCE PETITION.

V. Oorjitham for the petitioner.

Respondent undefended.

Cur. Adv. Vult.

Thomson C.J.: In this case the petitioner, John Martin, is seeking a decree of nullity of marriage. The respondent, Umi Kelsom binti Pakeh, has been served with the petition but has taken no part in the proceedings.

The petition is brought by virtue of the provisions of the Divorce Ordinance, 1952, which is the "written law for the time being in force relating to divorce and matrimonial causes" and which therefore by reason of paragraph 2 of the Second Schedule to the Courts Ordinance defines the jurisdiction of this Court in relation to matrimonial causes.

The Divorce Ordinance, 1952, follows generally the lines of the Indian Divorce Act, No. IV of 1869. Section 3 (which is the same as section 7 of the Indian Act) provides that:

> "The Court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the Court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings."

Section 14 provides that any husband or wife may present a petition to the Court praying that his or her marriage may be declared null and void. The grounds on which such a decree may be made are set out in section 15, and the one which is relevant here is "(f) that the marriage is invalid by the law of the place in which it was celebrated."

The facts of the present case are not in dispute.

On 25th February, 1950, the parties went through a form of marriage before a Registrar of Marriages for Selangor in accordance with the provisions of the then Christian Marriage Enactment (F.M.S. Cap. 109), which has since been repealed by the Christian Marriage Ordinance, 1956. At the time of solemnisation the petitioner was a British soldier who was domiciled in England and who professed the Christian religion. He was a bachelor and of full age. The respondent who was a widow and of full age was of the Malay race. She was domiciled in the State of Selangor and professed the religion of Islam.

After the marriage the parties lived together in Malaya for a number of years and I am satisfied that at some time the petitioner has acquired a domicile in this country. There were no children. They separated some time in 1960.

The petitioner now asks that his marriage be declared invalid *ab initio* on the ground that at the time of its solemnisation he was a Christian and the respondent was a Muslim and therefore by reason of her personal law incapable of inter-marrying with him.

It is, I think, generally accepted that by the Muhammadan Law a Muhammadan male may contract a valid marriage with a Muhammadan woman or with a *Kitabia*, that is a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A Muhammadan woman, however, cannot contract a valid marriage except with a

Muhammadan man. (See *Mulla*: "Principles of Mahommedan Law", 15th ed. p. 227). This incapacity, it is to be observed, probably derived originally from political rather than religious considerations. (See *Syed Ameer Ali*: "Mahommedan Law", 5th ed., p. 16) but, whatever the source of the incapacity, it is clear that in the eyes of the Muhammadan Law the respondent had no capacity to marry the petitioner. The petitioner, on the other hand, as a domiciled Englishman was under no incapacity which prevented him from marrying the respondent; at the time of the marriage both parties were of full age, neither of them was married to any other person and they were not within any degree of affinity with each other.

As regards form, the marriage was solemnised in a form which was lawfully available to and binding on the petitioner and in a form which was not then (as it now is) forbidden to a Muhammadan woman marrying a person professing the Christian religion. The fact, however, that it was solemnised in accordance with the requirements of the Christian Marriage Enactment did not of itself constitute the marriage a valid one. Section 71 of that Enactment provides:—

> "Nothing in this Enactment shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

It is true that while the terms of that section do not validate any marriage neither do they by themselves operate to make any marriage invalid. But, for reasons which I set out at length in the case of *Re Loh Toh Met* [1] and do not feel it necessary to repeat here, it is clear that the Christian Marriage Enactment is concerned exclusively with the forms according to which, and according to which only, certain classes of persons may contract a legally binding marriage and has nothing to do with the substantive law of marriage. The law relating to such questions as capacity to marry must be sought elsewhere.

What is actually the question here is a question of a conflict of laws. The putative husband had by his personal law capacity to intermarry with the putative wife but the personal law of the putative wife forbade her to intermarry with the putative husband.

The general principle recognised by the law is that the capacity of a party to contract a marriage depends on his or her personal law at the time the marriage contract is entered into and that this in its turn depends on domicile. In India, however, for historical reasons the personal law of an individual is and has been at any rate since the Regulations of Warren Hastings, the law of the religious society to which he belongs. The law of marriage in the case of a Hindu domiciled in India was, prior to the enactment of recent legislation in India, the Hindu Law and the law of marriage in the case of a Muslim is the law of Islam. "In India," says Sir Henry Mayne ("Hindu Law and Usage", 9th ed., p. 54), "there is no *lex loci* every person being governed by the law of his personal status."

That is also the position in this country, but here we have the added consideration (and complication) that in the case of persons of Chinese race the Courts recognise what they have held (probably wrongly in the beginning) to be the personal law of persons of that race. In the case of locally-domiciled persons professing the Christian religion the law has always, as in India, been taken to be the law of England.

Now, these various systems of law which affect marriage differ in many ways in relation to many matters. They differ as regards capacity; a Muslim woman, for instance, is incapable of marrying with a non-Muslim man, while a non-Muslim woman is under no such incapacity. They differ as to the nature of the relationship which they lead to; a Muslim marriage leads to a relationship which is potentially polygamous in the case of the man but is always monogamous in the case of the woman. A Chinese customary marriage is potentially polygamous at any rate on the part of the husband though it is open to Chinese persons to contract a monogamous marriage under the Civil Marriage Ordinance. A Hindu marriage may be polygamous or monogamous according to the sect of Hinduism to which the parties belong. Again, the permitted modes of solemnisation vary. In 1950 (the position has now been varied to some extent in detail by modifications in the statute law) a person professing the Christian religion could only contract a valid marriage by a religious or civil ceremony under the appropriate Christian marriage law which differed according as to whether the place of solemnisation was in Penang or Malacca or was elsewhere in the Federation. A Muslim could enter into a Muhammadan marriage, potentially polygamous in the case of the husband, by the accepted ceremony of *nikah* or could in Penang or Malacca (but not elsewhere) enter into a monogamous marriage under the Civil Marriage Ordinance of the Straits Settlements, as could a Chinese who could also, unless he professed the Christian religion, enter into a polygamous marriage by Chinese customary rites.

The position thus is that there are several laws relating to marriage and the forms of its solemnisation and several classes of persons whose personal law relating to marriage differs. These persons are not divided from each other by residence in different political areas but by lines of religious and racial difference within the same political area and they are all subject to the jurisdiction of this Court.

In most cases there is no dispute as to the law to be followed and no difficulty arises. Here, however, there is a conflict between the personal laws of the parties. The putative husband was permitted to contract this marriage by his personal law. The putative wife had by her personal

law a definite incapacity to contract it. Which law is to prevail?

At this point it is desirable to go back to section 3 of the Divorce Ordinance which provides that in all proceedings under it, and this proceeding is brought under it, the Court should act on the principles on which the English Courts could act.

At this stage let me make myself very plain. I am not saying anything that has any application to any proceedings other than under the Divorce Ordinance. Nor am I saying that the Court should apply generally or in all cases the principles which would be applied by the Courts in England to any question as to the validity of a Muslim marriage as such or the capacity to marry of a Muslim woman. What I am saying is that a question of the conflict of laws which arises in relation to a matter regarding which the Court's jurisdiction comes from the Divorce Ordinance is to be determined on the same principles as those on which such a question would be determined by the English Courts.

Now, in my opinion if this marriage had been solemnised in a Registry Office in London and not in Kuala Lumpur the English Divorce Court would hold it to be valid. That opinion is based on the well-known cases of *Sottomayer* v. *De Barros* [2], *Ogden* v. *Ogden* [3] and *Chetti* v. *Chetti* [4].

In *Sottomayer* v. *De Barros* the husband was a Portuguese domiciled in England and the wife was a Portuguese domiciled in Portugal. They were first cousins and as such were free to marry according to the law of England but incapable of inter-marrying by the law of Portugal. In *Ogden* v. *Ogden* the wife was a woman of full age domiciled in England and the husband was domiciled in France. Prior to the proceedings in England a French Court had declared the marriage to be null on the ground that the husband was under full age and so incapable of marrying without the consent of his parent which had not been given. In *Chetti* v. *Chetti* the wife was domiciled in England while the husband was a Hindu domiciled in India who was by his personal law forbidden to inter-marry with a woman who was not a Hindu or who was not of his own caste.

In each case the marriage was solemnised in England in accordance with the English law and in each case the Court held the marriage to be valid.

These cases may, no doubt, set up an exception to the general rule that a marriage is only valid when each of the parties has the capacity to marry the other according to the law of his or her domicile. That exception may be, as is suggested by the editor of the latest edition of *Dicey* on "Conflict of Laws" (7th ed., p. 265), of an "illogical character". It may be that "it is not a juridical doctrine, that is, not one which can be reasoned out from legal principles". (*Westlake*: "Private International Law", 7th ed., p. 62). It certainly shews, as was said with regard to England by Sir Gorell Barnes in the course of the argument in *Chetti* v. *Chetti* (at p. 69) that "this country, differing in that respect from other countries, has repudiated the doctrine ..... that a man carries about with him his own personal law". Nevertheless, logical or not, insular or not, the law which is applicable in England would clearly appear to be as applied in these cases and there is no reason for thinking that applying it to the hypothetical case of the marriage in the present case having been solemnised in London the English Courts would not uphold the validity of that marriage.

Returning now to the actual facts of the present case, that is that the marriage was solemnised in Kuala Lumpur, it will be well to remember *in limine* that the domicile of any person whose domicile in the ordinary sense is in this country, at any rate so far as regards questions of personal law, does not as in England, and of course as in many other countries, depend on purely geographical and physical considerations. It is not enough to ask: "is his home in Malaya"? The further question must be asked: "if his home is in Malaya, to which of the groups of persons having different systems of personal law does he belong"? The answer to that question in the case of the putative wife in the present case is that at the time of the marriage her domicile was in Malaya in the group of persons professing the Muslim religion and whose personal law is the law of Islam. At the time of the marriage the domicile of the husband was in England and his personal law was the law of England. And there has been no change in his personal law by reason of his change of domicile in Malaya, for his domicile is now in Malaya in the group of persons whose personal law is the English law.

Such being the domicile of the parties they voluntarily entered into a contract of marriage and had that marriage solemnised according to the law appropriate to the husband's domicile. It is therefore according to that law that the validity of that marriage must be judged by this Court, at any rate in the exercise of its jurisdiction under the Divorce Ordinance. They may not have crossed a physical line but they did cross a notional line which in local circumstances was equally a legal reality. On the authorities that have been quoted the marriage was thus a valid one.

I find some small support for this view in the local case of *Public Prosecutor* v. *White* [5]. That was a bigamy case. The accused who was at the time a Christian married a Christian woman, the marriage being solemnised under the Christian Marriage Enactment. While his wife was still alive he became converted to Islam and contracted a Muhammadan marriage with another woman. Horne J. held that the first marriage was a valid monogamous one and that the husband in contracting the second one during the existence of the first was guilty of bigamy. In the course of his judgment he made the following observations (at p. 215):—

"We have in the Federated Malay States a law under which such a marriage (i.e. a monogamous marriage) can be celebrated and when so celebrated it is legally recognised as a valid marriage. Moreover, the prohibition of either spouse marrying another person while such marriage subsists is enforceable by penal sanction. It is also possible in the Federated Malay States for persons to enter into polygamous marriages and acquire the status arising out of such marriages or conferred upon the parties by the law or custom under which such marriages are contracted; and the status and the rights and obligations flowing therefrom are given legal recognition in the Courts of the Federated Malay States as part of the local civil law.

I am therefore bound to hold and so to direct myself that as monogamous and polygamous marriages are recognised by the civil law, a man who enters into a marriage relationship with a woman according to monogamous rites takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of 'husband' in a monogamous marriage."

That case, of course, is not on all fours with the present one. Nevertheless the course of reasoning that would seem to be adumbrated in the passage that has been quoted is very similar to the course of reasoning that I have followed here.

Before departing from the case one further observation should be made. At first sight it may seem strange that there would appear to be no assistance to be had from the decisions of the Courts in India where the position regarding domicile is so similar to the position here. The reason, however, is probably to be found in the fact that section 19 of the Indian Divorce Act, which corresponds to section 15 of our Ordinance, does not include "that the marriage is invalid by the law of the place in which it was celebrated" as one of the grounds on which a decree may be granted and in the case of *Gasper* v. *Gonsalves* (6) it was held that in India the Court had no jurisdiction to make a decree of nullity on the ground that a marriage was invalid.

There is, however, some indication as to the attitude of Indian jurists to be found in the following passage from the late *Syed Ameer Ali's* treatise on the Mahommedan Law (5th ed., p. 151):—

"As long as a Musulman retains his original domicile, so long his status and his personal capacity to do certain legal acts remain subject to the Islamic Law. The moment, however, he abandons the domicile of origin, or as soon as he acquires or adopts a new domicile, he ceases to be governed by the law of his nation. For example, an Indian Musulman when he once takes up his abode permanently in England, or shows distinctly by some conduct on his part that his stay in this country is not in the nature of a sojourn, but that he has what is called an *animus manendi*, is subject thenceforward, in all matters relating to succession and personal status, to the English Law. He ceases to be under the jurisdiction of the Musulman Civil Law. The moral and religious portions of the law remain binding upon his conscience, but his subjection to the jurisdiction of the English Law has the effect of withdrawing him from the *regime* of the secular law of his own nation."

Later in the same treatise the learned author discusses the question of the legitimacy of the children of a marriage between a Moslem woman and a man professing another religion. He points that the law of Islam "discountenances" such marriages, but goes on to say (at p. 351):—

"According to the *Majm'a-ul-Fatawa*, the *Durr-ul-Mukhtar* and the *Radd-ul-Muhtar* such a marriage is absolutely nugatory, and if there is cohabitation, it is tantamount to *zina*. Naturally, in the opinion of these jurists, the children would be illegitimate. This is an extreme doctrine, the enforcement of which in British India, would not only be attended with difficulty, but lead to consequences of an anomalous character. For example, if a non-Moslem, whose personal law recognised a marriage with a woman of a different persuasion, or who could contract such a marriage under the *lex loci* or Municipal Law, — were to marry a Musulman woman, she probably can get the marriage set aside on the ground that it was unlawful according to her personal law. But if she chose to abide by it, there is no machinery by which it can be cancelled. The issue of such a union, being regarded as illegitimate, would not be entitled to inherit to their Musulman relatives but would certainly inherit from their father, as they would be legitimate according to his personal law. Neither would they inherit from their mother, if she died in the Faith of Islam."

While those passages may not very strongly support they certainly detract in no way from the views that have been expressed here.

The petition is dismissed.

Petition dismissed.

Solicitors: *Bannon & Bailey.*

Re E. J. NATHAN, DECD.

[O. C. J. (Wee Chong Jin J.) July 4, 1962]

[Singapore — Originating Summons No. 148 of 1961]

Will — Devise of residuary estate to children — Vesting postponed for 10 years — Bequests revoked with substitution therefor — Whether substituted bequests vest absolutely.

On January 20, 1955, the testator made a will under clause 5(c) of which trustees were directed to stand possessed of his residuary estate in trust for his children in certain shares. Clause 5(d) stated that such shares shall not vest immediately but shall be retained by the trustees to pay the income thereof to the children for a period of ten years from the date of the testator's death. Clause 5(e) provided for certain gifts over in certain contingencies. By a codicil dated April 7, 1960, the testator revoked clause 5(c) and in place thereof directed the trustees to hold the said residuary estate for his children in equal shares. The question for determination was whether the codicil on its true construction also revoked clause 5(d) and (e) of the will on the principle that where a gift is revoked it revokes the gift over clauses dependent on it.

Held: the intention of the testator was to vary the shares his children would take and not to revoke the limitations over.

Case referred to:—

(1) *Boulcott* v. *Boulcott* (1853), 2 Eq. R. 457; 61 E.R. 627 distinguished.

ORIGINATING SUMMONS.

Punch Coomaraswamy for the Executors & Trustees.

S. H. D. Elias for the beneficiaries except J. A. Nathan.

J. Grimberg for the grandchildren.